

December 8, 2009

David Gordon
Member, Burbank City Council
851 N. Hollywood Way
Burbank, California 91505-2814

Re: Your Request for Advice
Our File No. A-09-240

Dear Mr. Gordon:

This letter responds to your request for advice regarding the conflict-of-interest provisions of the Political Reform Act (the "Act").¹ Please note that our advice is based solely on the provisions of the Act. We therefore offer no opinion on the application, if any, of other conflict-of-interest laws such as common law conflict of interest or Government Code Section 1090. We urge you to consult with your city attorney or private counsel regarding these provisions outside the Act.

QUESTIONS

1. May you participate in city council decisions to approve (i) collective bargaining agreements, (ii) individual employment agreements, or (iii) compensation packages for city staff not represented by a union, that include as an employee benefit vision care insurance, or flexible spending accounts that permit employees to use their accounts for purchase of vision care insurance?

2. Is VSP, a vision care insurer the city has historically contracted with to provide vision care insurance for city employees, a source of income to you, a VSP optometrist?

¹ The Political Reform Act is contained in Government Code Sections 81000 through 91014. All statutory references are to the Government Code, unless otherwise indicated. The regulations of the Fair political Practices Commission (the "Commission") are contained in Sections 18110 through 18997 of Title 2 of the California Code of Regulations. All regulatory references are to Title 2, Division 6 of the California Code of Regulations, unless otherwise indicated.

3. Is a city employee who selects you as his or her optometrist, and pays you for services not covered by the city's vision care plan, (including co-payments), a source of income to you for purposes of the Act's conflict-of-interest provisions?

4. Are payments you receive from a city employee for services not covered by VSP aggregated with payments you receive from VSP for covered services for that employee?

5. If you have a disqualifying conflict of interest, may city council decisions regarding employee compensation and benefits be segmented so that you would recuse yourself from voting on issues relating to vision care benefits and then vote on issues involving other compensation and benefits?

CONCLUSIONS

1. If these governmental decisions make any changes in the vision care benefits currently provided to city employees who are patients of yours, and these changes result in so much as a penny increase or decrease to any person who is a source of income to you, you will have a conflict of interest. Notwithstanding the possibility that city council decisions to adopt the Agreements may have a material financial effect on one or more of your economic interests, these decisions lend themselves to the segmentation process, discussed below.

2. No. Because your city-employed patients exercise sufficient control over VSP payments made on their behalf by selecting you, instead of other optometrists, the patients, rather than VSP, are sources of income to you.

3. Yes. If amounts paid directly by the city employee and amounts paid by VSP on behalf of that employee total \$500 or more within a 12-month period preceding a governmental decision financially affecting that employee, the city employee is a source of income to you for purposes of the Act's conflict-of-interest provisions.

4. Yes. Payments you receive from VSP for services provided for an employee are attributable to the employee because the employee exercises sufficient control over the income you receive from VSP on his or her behalf, simply by selecting you instead of another optometrist.

5. Yes. If you have a disqualifying conflict of interest with respect to a decision to approve a collective bargaining agreement, individual employment agreement, or compensation package for other city staff, the decision regarding vision care benefits may be segmented from other provisions of these contracts.

FACTS

You are a city council member of the City of Burbank (the “City”). The city council is called upon from time-to-time to approve collective bargaining agreements covering employees represented by a union (“MOUs”), compensation arrangements for non-represented city staff and individual employment agreements for certain city officials (collectively, the “Agreements.”) These Agreements provide employee benefits that generally include vision care insurance. Some Agreements also provide for flexible spending accounts that permit employees to use these accounts to purchase vision care insurance.

You are also an optometrist with a solo practice located in the city of Burbank. Since starting your practice in 1979, you have accepted vision care insurance from many different insurers, including VSP, that cover individuals under their employer’s employee benefit plan. VSP is a non-profit corporation with gross annual receipts exceeding \$400 million. Employees receiving VSP benefits may select any optometrist from a list of VSP panel/provider doctors (“VSP optometrists”) or any other optometrist. All VSP optometrists must charge patients according to the same fee schedules established for the various plans. Hence, VSP patients always pay the same amount for the same materials and services regardless of which VSP provider they patronize. In your 27 years of practice, you have provided vision care to very few city employees. In fiscal year 2008-2009 only three of your patients were city employees with VSP coverage. VSP paid you a total of \$352 for services you performed for these three patients. You currently have approximately 14,000 patients. About 40-50% of your patients have vision care under one or more VSP plans. You have reported VSP as a source of income on your Form 700 each year during which you have been a public official.

Since July 1, 2006, the City has contracted with VSP to provide vision care insurance for the city’s employees and officials. For the fiscal year 2008-2009, the City paid VSP \$106,191.78 in premiums. The VSP contracts are not negotiated or approved by the city council, but instead, are handled, in all respects, at the staff level. The most recent contract was renewed in August 2008 for a period of 35 months. You had no participation in the negotiation or renewal of the contract. The Agreements, including the MOUs, historically have not specified any particular insurer to deliver vision care benefits. However, the most recent draft MOU with the Burbank City Employees Association identifies VSP as the current insurance carrier but indicates that the identity of the insurer might change.

ANALYSIS

Section 87100 of the Act prohibits any public official from making, participating in making, or otherwise using his or her official position to influence a governmental decision in which the official has a financial interest. The Commission has adopted an eight-step standard analysis for deciding whether an official has a disqualifying conflict

of interest. (Regulation 18700(b).) The general rule, however, is that a conflict of interest exists whenever a public official makes a governmental decision that has a reasonably foreseeable material financial effect on one or more of his or her financial interests.

Step 1. Are you a “public official” within the meaning of Section 87100?

Section 82048 defines a public official as “every member, officer, employee or consultant of a state or local government agency.” As a member of the Burbank City Council, which is a local government agency, you are a public official. Therefore, you may not make, participate in making, or otherwise use your official position to influence any decisions that will have a reasonably foreseeable material financial effect on any of your economic interests.

Step 2. Will you be making, participating in making or influencing a governmental decision?

A public official “makes a governmental decision” when the official, acting within the authority of his or her office or position, votes on a matter, obligates or commits his or her agency to any course of action, or enters into any contractual agreement on behalf of his or her agency. (Regulation 18702.1.) A public official “participates in a governmental decision” when, acting within the authority of his or her position and without significant substantive or intervening review, the official negotiates, advises, or makes recommendations to the decisionmaker regarding the governmental decision. (Regulation 18702.2.) A public official is attempting to use his or her official position to influence a governmental decision that is before his or her agency when, for the purposes of influencing the decision, the official contacts or appears before or otherwise attempts to influence, any member, officer, employee, or consultant *of his or her agency*. (Regulation 18702.3(a).) A public official is attempting to use his or her official position to influence a governmental decision that is before an agency, *other than the official’s agency* if, for the purpose of influencing the decision, the official acts or purports to act, on behalf of, or as the representative of his or her agency. (Regulation 18702.3(b).)

You have identified the following governmental decisions in which you will be involved as a city council member: approval of MOUs, compensation packages for non-represented city staff and individual employment agreements, most of which provide vision care insurance and, in some instances, flexible spending accounts that permit use of the accounts for vision care insurance.

Step 3. What are your economic interests?

The Act’s conflict-of-interest provisions apply only to conflicts of interest arising from certain enumerated economic interests. These economic interests are described in Section 87103 and Regulations 18703-18703.5, inclusive:

- A public official has an economic interest in a business entity in which he or she has a direct or indirect investment of \$2,000 or more. (Section 87103(a); Regulation 18703.1(a).)
- A public official has an economic interest in a business entity in which he or she is a director, officer, partner, trustee, employee, or holds any position of management. (Section 87103(d); Regulation 18703.1(b).)
- A public official has an economic interest in real property in which he or she has a direct or indirect interest of \$2,000 or more. (Section 87103(b); Regulation 18703.2.)
- An official has an economic interest in any source of income, including promised income, totaling \$500 or more within 12 months prior to the decision. (Section 87103(c); Regulation 18703.3.)
- A public official has an economic interest in any source of gifts to him or her if the gifts total \$420 or more within 12 months prior to the decision. (Section 87103(e); Regulation 18703.4.)
- A public official has an economic interest in his or her personal expenses, income, assets, or liabilities, as well as those of his or her immediate family. This is commonly referred to as the “personal financial effects” rule. (Section 87103; Regulation 18703.5.)

Business Entity

You have an economic interest in your optometry practice as a business entity on two bases.² First, you presumably have an investment of \$2,000 or more in the practice. (Section 87103(a).) Second, as its sole proprietor and single practitioner, you hold a management position in, and are an employee of, the business entity. (Section 87103(d).)

Sources of Income

You have a source of income economic interest in your optometry practice and from any persons from whom you received income of \$500 or more within the 12-month period preceding the government decision.³ (Section 87103(c).)

² Any enterprise, including a sole proprietorship, that is operated for profit is a “business entity” under Section 82005. Thus, your practice is a “business entity” for purposes of the Act.

³ Because you own an interest of ten percent or greater in your practice, any sources of income to the practice from whom you receive pro rata income totaling \$500 or more within 12 months prior to your participating in a governmental decision will also be a source of income to you. (Section 82030(a).)

VSP: You indicate that you have been reporting VSP as a source of income on your Form 700, presumably because you receive \$500 or more in payments from VSP in a 12-month reporting period. Under most circumstances, VSP would be a source of income to you because of these payments. However, the Commission has advised that if a patient exercises sufficient control over payments to a doctor by selecting that doctor, instead of other doctors, the patient, rather than their insurance carrier, is the source of income to the doctor. (*Morris* Advice Letter, No. I-90-373; see also page four of the instructions included in Form 700, a copy of which is enclosed.) You indicate that VSP participants are free to select any optometrist, regardless of whether he or she is a VSP optometrist. Under these circumstances, VSP is not a source of income to you, as the income otherwise provided is paid on behalf of the covered beneficiary by contractual arrangements. Thus, each city employee who selects you as his or her optometrist is a potential source of income to you, and not the insurance provider

Aggregation: You ask whether payments made by an employee/patient for services not covered by VSP, including co-payments, must be aggregated with payments made by VSP for that patient's covered services for purposes of determining if the \$500 threshold has been met. Consistent with the rule stated in *Morris, supra*, we have advised that where a business entity pays a person as directed by its client, the true source of the payment is the client. (*Kolkey* Advice Letter, No. A-95-014.) Accordingly, when VSP pays you for services on behalf of a patient, those payments are attributed to the patient and must, therefore, be aggregated with payments made directly to you by that patient.

You indicate that for the 2008-2009 fiscal year, you treated three city-employed patients for whom VSP paid you a total of \$352. While this amount falls below the \$500 threshold, we do not know the amount, if any, that each employee/patient paid you directly for services not covered by VSP. If the total amount paid by VSP on behalf of a covered employee/patient combined with the amount paid by that employee/patient was \$500 or more, that person is a source of income to you. If not, you do not have an economic interest in that person as a source of income to you.

Personal Finances

A public official is considered to always have an economic interest in his or her personal finances. However, a financial effect on the value of real property owned directly or indirectly by a public official, and a financial effect on the gross revenues, expenses, or value of assets and liabilities of a business entity in which a public official has a direct or indirect investment interest, are not considered separate financial effects on the official's personal finances and would not be analyzed separately under the "personal financial effects" rule. (Regulation 18705.5(a).) Accordingly, the personal financial effects rule does not appear to apply to your circumstances and we will not discuss it further.

Step 4. Will your economic interests be directly or indirectly involved in decisions you will make, participate in making or influence as a public official?

Business Entities and Sources of Income

Under Regulation 18704.1(a) a person, including business entities and sources of income, is directly involved in a decision before an official's agency when that person, either directly or by an agent:

“(1) Initiates the proceeding in which the decision will be made by filing an application, claim, appeal, or similar request or;

“(2) Is a named party in, or is the subject of, the proceeding concerning the decision before the official or the official's agency. A person is the subject of a proceeding if a decision involves the issuance, renewal, approval, denial or revocation of any license, permit, or other entitlement to, or contract with, the subject person.”

Your practice: Your business will neither initiate nor be a party in or the subject of the city council proceedings in which decisions are made regarding MOUs, employee compensation packages, or individual employment agreements. Hence, your business is not directly involved in these decisions. If a public official's economic interest is not directly involved in a governmental decision, it is indirectly involved. (Regulation 18704.)

Employee/patients: City employees, including those who are your patients, are subjects of these proceedings because decisions to approve an MOU, compensation package or employment agreement involve approval or denial of “entitlements to” or “contracts with” the employees covered by the MOU, compensation package, or employment agreement. For example, an MOU is a contract between the city and the covered employees. In addition, a decision to approve an MOU necessarily involves approval of all the terms of the MOU, including terms that provide vision care insurance, an entitlement to the employees. Accordingly, patients who are city employees are directly involved in these decisions.

Step 5. What is the applicable materiality standard?

A conflict of interest may arise only when the reasonably foreseeable financial effect of a governmental decision on a public official's economic interest is material. (Regulation 18700(a).) Different standards apply to determine whether a reasonably foreseeable financial effect on an economic interest will be material, depending on the

nature of the economic interest and whether that interest is directly or indirectly involved in the agency's decision.

Your practice: The applicable materiality standards for governmental decisions involving business entities, such as your practice, are found in Regulation 18705.1. Subdivision (c) sets forth materiality standards for economic interests in business entities that are *indirectly* involved in a governmental decision, including those that are sources of income and are business entities. (See Regulation 18705.3(b)(1). For relatively small businesses, such as your practice, the financial effect of a governmental decision on the business entity is material if it is reasonably foreseeable that the governmental decision will increase/decrease the business entity's annual gross revenues by \$20,000 or more, result in the business entity incurring/avoiding additional expenses or reducing/eliminating existing expenses by \$5,000 or more in a fiscal year or increase/decrease the value of the business entity's assets by \$20,000 or more. (Regulation 18705.1(c)(4).) Based on the size of your business, as stated in your letter, this is the applicable materiality standard.

Employee/Patients: Regulation 18705.3(a) states that any reasonably foreseeable financial effect on a person who is a source of income to a public official, and who is directly involved in a decision before the official's agency, is deemed material. Accordingly, *any* foreseeable financial effect that governmental decisions in which you participate will have on any of your patients, who are city employees and are sources of income to you, is deemed material.

Step 6. Is it reasonably foreseeable that the financial effect of a governmental decision on your economic interests will meet the applicable materiality standard?

An effect is considered "reasonably foreseeable" if the effect is "substantially likely." (Regulation 18706; *In re Thorner* (1975) 1 FPPC Ops. 198.) A financial effect need not be a certainty to be considered reasonably foreseeable. On the other hand, if an effect is only a mere possibility, it is not reasonably foreseeable.

Your practice: You indicate that during fiscal year 2008-2009, you provided services to three city employees with VSP insurance and that VSP paid you \$352 for these services. This amount represents less than 1/10th of one percent of your total gross income from your practice and is well below the \$20,000 materiality threshold for a small business entity. You have not provided any specific details regarding the potential changes to the vision care plan being considered as part of the governmental decision, but it seems unlikely that you will receive \$20,000 or more for new services rendered to employee/patients as a result of any potential changes to that plan.

Employee/patients: As stated above, *any* foreseeable financial effect that governmental decisions in which you participate will have on your patients who are

sources of income to you is deemed material. Because the governmental decision involves continuing, eliminating, or making changes to the current provisions of the vision care plan, those changes will have a “penny’s” financial effect on any person who is a source of income to you at the time the governmental decision is made and you will have a conflict of interest and are prohibited from participating in the decision. The Commission does not act as a finder of fact in providing advice. (*In re Oglesby* (1975) 1 FPPC Ops. 72.) Therefore, the determination of whether or not it is reasonably foreseeable that governmental decisions regarding the Agreements will have any financial effect on one or more of your employee/patients is necessarily a factual question that is ultimately for you to decide.

Segmentation of Decisions: For purposes of determining conflicts of interest under the Act, governmental decisions are analyzed independently to determine if there will be a foreseeable and material financial effect on a public official’s economic interest. (*In re Owen* (1976) 2 FPPC Ops. 77.) Therefore, under certain circumstances, a public official disqualified from one decision may participate in other related decisions, provided that the official’s participation in the latter does not affect the decision in which he or she has a disqualifying conflict of interest. (*Sweeney* Advice Letter, No. A-89-639.)

Some decisions are too interrelated to be considered separately so that the official’s conflict of interest on one decision will be disqualifying for the other. (*Kilian* Advice Letter, No. A-89-522; *Miller* Advice Letter, No. A-82-119.) Decisions are inextricably interrelated where, among other things, one decision is a necessary condition precedent or condition subsequent for another. Thus, a public official would have to disqualify himself or herself if the result of one decision would effectively determine or nullify the result of another.

Regulation 18709(a) explains the segmentation process:

“(a) An agency may segment a decision in which a public official has a financial interest, to allow participation by the official, provided all of the following conditions apply:

“(1) The decision in which the official has a financial interest can be broken down into separate decisions that are not inextricably interrelated to the decision in which the official has a disqualifying financial interest;

“(2) The decision in which the official has a financial interest is segmented from the other decisions;

“(3) The decision in which the official has a financial interest is considered first and a final decision is reached by the agency without the disqualified official’s participation

in any way; and

“(4) Once the decision in which the official has a financial interest has been made, the disqualified public official’s participation does not result in a reopening of, or otherwise financially affect, the decision from which the official was disqualified.

“(b) For purposes of this regulation, decisions are ‘inextricably interrelated’ when the result of one decision will effectively determine, affirm, nullify, or alter the result of another decision.”

A decision to adopt an Agreement can be viewed as multiple decisions regarding wages and benefits for employees covered by the Agreement. If the decision to provide or exclude vision care insurance as an employee benefit will determine other decisions regarding wages and benefits, these decisions will be inextricably interrelated. Under such circumstances, you may be prohibited from participating in any of the decisions to adopt an Agreement. However, if wage and benefits decisions may be logically segregated, the city council may procedurally segregate the decision regarding vision care benefits to allow you to participate, if need be. It appears that the decision whether to provide or exclude a vision care benefit in an Agreement lends itself to the segmentation process. If you have a conflict of interest because of the vision care provisions, once the separate decision regarding vision care insurance is finalized, you may participate in decisions relating to all other aspects of the Agreement.

Steps 7 & 8. The “public generally” and “legally required participation” exceptions.

Even if a material financial effect on a public official’s economic interest is reasonably foreseeable, he or she still may not be disqualified if the financial effect of the governmental decision on the public official’s economic interest is indistinguishable from its effect on the public generally (Section 87103, Regulations 18700(b)(7) and 18707(a)), or if the official is legally required to participate (Section 87103; Regulation 18708). You have not presented any facts indicating that either of these exceptions is applicable to your situation.

If you have other questions on this matter, please contact me at (916) 322-5660.

Sincerely,

Scott Hallabrin
General Counsel

By: Valentina Joyce
Counsel, Legal Division

Enclosure